American Bar Association
www.supremecourtpreview.org

No. 07-512

IN THE
Supreme Court of the United States

PACIFIC BELL TELEPHONE COMPANY
D/B/A AT&T CALIFORNIA, ET AL.,
Petitioners,

v.

LINKLINE COMMUNICATIONS, INC., ET AL.,
Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

REPLY BRIEF FOR PETITIONERS

ED KOLTO
GLEAM O. DAVIS
AT&T SERVICES, INC.
1150 South Olive Street
Los Angeles, CA 90015
(213) 743-6700

PATRICK J. PASCARELLA
AT&T SERVICES, INC.
175 E. Houston Street
San Antonio, Texas 78205
(210) 351-3409

MICHAEL K. KELLOGG
Counsel of Record
AARON M. PANNER
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Petitioners

November 13, 2008

CORPORATE DISCLOSURE STATEMENTS

Petitioners' Rule 29.6 Statements were set forth at page iii of their opening brief, and there are no amendments to those Statements.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENTS i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

ARGUMENT 3

I. RESPONDENTS' CONCESSION THAT THE NINTH CIRCUIT ERRED SUPPORTS REVERSAL BUT DOES NOT AFFECT THE NEED FOR REVIEW ON THE MERITS 3

A. The Ninth Circuit Should Have Reversed the District Court's Denial of AT&T's Motion for Judgment on the Pleadings 3

B. Respondents' Concession Does Not Deprive the Court of Jurisdiction or Lessen the Importance of the Question Presented 5

II. THE NINTH CIRCUIT'S RULING CONFLICTS WITH THIS COURT'S ANTITRUST JURISPRUDENCE 9

A. *Trinko* Bars Respondents' Claim 9

B. Recognition of Price-Squeeze Claims As an Independent Antitrust Tort Is Contrary to Precedent and Sound Antitrust Policy 11

1. The existence of a price squeeze does not support any inference of consumer harm 12

2. Recognition of price-squeeze claims would deter pro-competitive conduct..... 17

3. Price-squeeze doctrine forces courts to act as regulators..... 18

4. Consideration of the regulatory context supports dismissal..... 20

CONCLUSION..... 22

TABLE OF AUTHORITIES

Page

CASES

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) 13

Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983) 15

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007) 18

Bob Jones Univ. v. United States, 461 U.S. 574 (1983) 7

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) 3, 4, 11, 13, 17

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 13

Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83 (1993) 6

Catt, In re, 368 F.3d 789 (7th Cir. 2004) 16

Deakins v. Monaghan, 484 U.S. 193 (1988) 7

Forney v. Apfel, 524 U.S. 266 (1998) 6

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) 8

Granville-Smith v. Granville-Smith, 349 U.S. 1 (1955) 7

INS v. Chadha, 462 U.S. 919 (1983) 7

Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 (1988) 6, 7

Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370 (7th Cir. 1986) 18

Roberts v. Galen of Virginia, Inc., 525 U.S. 249 (1999) 1, 4

Schor v. Abbott Labs., 457 F.3d 608 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 1257 (2007) 14, 18

Sibron v. New York, 392 U.S. 40 (1968) 7

Toibb v. Radloff, 501 U.S. 157 (1991) 7

Town of Concord v. Boston Edison Co., 915 F.2d 17 (1st Cir. 1990) 12

U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18 (1994) 9

United States v. Parke, Davis & Co., 362 U.S. 29 (1960) 16

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) 1, 2, 3, 9, 10, 11, 13, 18, 21

Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) 7

CONSTITUTION, STATUTES, AND RULES

U.S. Const. art. III 6

Sherman Act, 15 U.S.C. § 1 *et seq.* 1

§ 1, 15 U.S.C. § 1..... 16

§ 2, 15 U.S.C. § 2.....1, 2, 4, 6, 7, 11, 12, 14, 16

Sup. Ct. R. 10 8

OTHER MATERIALS

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (3d ed. 2008):

Vol. 2 5

Vol. 3B.....10, 13, 14, 16

Dennis W. Carlton, *Should "Price Squeeze" Be a Recognized Form of Anticompetitive Conduct?*, 4 J. Competition L. & Econ. 271 (2008) 14

INTRODUCTION

The Ninth Circuit held that respondents had stated a claim under Section 2 of the Sherman Act by alleging that AT&T engaged in a price squeeze – even though AT&T had no antitrust duty to deal with respondents at all. That holding conflicts with *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), and this Court's Section 2 jurisprudence, and the Court should reverse the judgment of the court of appeals.

After defending the Ninth Circuit's price-squeeze holding at the petition stage, respondents now confess that the Ninth Circuit erred and that their price-squeeze claim survives *Trinko only* if respondents allege that AT&T engaged in predatory retail pricing. *See* Resp. Br. 13, 18, 41. Respondents' concession, while not "dispositive of [the] legal issue," provides "further indication" that the opinion below is erroneous. *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253 (1999) (per curiam).

Amici's suggestion that respondents' concession renders the case either moot or inappropriate for review on the merits is incorrect. Respondents have not abandoned their Section 2 claim, nor have they even conceded that the district court's failure to grant AT&T's motion for judgment on the pleadings was erroneous. The parties thus remain adverse, and this Court has jurisdiction. Moreover, all of the reasons that counseled in favor of review in the first place – including the chilling effect of the Ninth Circuit's decision on pro-competitive conduct – still counsel in favor of resolution of the question presented.

Amici's defense of "price squeeze" as an "independent antitrust tort," Comptel Br. 2, fails to provide any justification for imposition of the competitor-protecting duty that the doctrine embodies. *First*, their arguments fail to reckon with *Trinko*, which teaches that, in the absence of a duty to deal under the antitrust laws, complaints about the terms under which a monopolist deals – even if such dealing is compelled by regulation – fail to state a claim under Section 2. *Second*, and more fundamentally, *amici* offer no persuasive reason to believe that any harm from price squeeze – as distinct from unlawful refusal to deal or predatory pricing – is significant, practically identifiable, or subject to court-ordered remedy; by contrast, the consumer harm from recognition of price squeeze as a basis for liability is both substantial and pervasive. Price-squeeze doctrine forces vertically integrated producers to pull their competitive punches with respect to efficient production and aggressive pricing, and it deters voluntary dealing. The Court should accordingly reject allegations of price squeeze as a basis for potential liability under Section 2.

ARGUMENT

I. RESPONDENTS' CONCESSION THAT THE NINTH CIRCUIT ERRED SUPPORTS REVERSAL BUT DOES NOT AFFECT THE NEED FOR REVIEW ON THE MERITS

A. The Ninth Circuit Should Have Reversed the District Court's Denial of AT&T's Motion for Judgment on the Pleadings

1. AT&T maintains that the district court erred in failing to grant AT&T's motion to dismiss respondents' complaint. The Ninth Circuit disagreed and affirmed the district court's decision "because [respondents'] allegation that [AT&T's] pricing scheme created an anticompetitive price squeeze states a potentially valid claim under § 2 of the Sherman Act." Pet. App. 19a.

In opposing the petition for certiorari, respondents defended the Ninth Circuit's holding and its reasoning, contending that allegations that a vertically integrated monopoly "intentionally charged . . . wholesale prices that were too high in relation to" retail prices state a claim, despite this Court's ruling in *Trinko*. Br. in Opp. 1; *see also id.* at 3 (asserting that "price squeeze claims need not satisfy the predatory pricing requirements of" *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)), 16-17 & n.8.

Without explaining – or even acknowledging – their change of position, respondents now concede that the legal rationale underlying the decision of the panel majority is in error, stating that "it is clear respondents' pricing [sic] squeeze claim survives *Trinko* only if it satisfies the requirements of a predatory retail pricing claim under *Brooke Group*." Resp. Br. 13. Respondents accordingly urge the Court

to vacate the decision of the Ninth Circuit and to remand the case "with instructions that respondents be given leave to amend their complaint to allege, if they can, a valid retail predatory pricing claim under *Brooke Group*." *Id.* at 18.

The Court *should* vacate the decision below, making clear that the answer to the question presented is "no." A plaintiff does *not* state a claim under Section 2 by alleging that a vertically integrated monopolist with no antitrust duty to deal has left an insufficient margin between wholesale and retail prices to allow wholesale customers to compete at the retail level. *Cf.* Pet. i. Respondents' failure to contest the point in its merits brief, while not controlling, is, as this Court has recognized in the past, a strong indication that the position respondents defended at the certiorari stage is indefensible. *See Galen of Virginia*, 525 U.S. at 253.

2. The Court should also hold that the complaint failed to state a claim under Section 2 and should have been dismissed. The possibility to which respondents devote the bulk of their merits brief – that respondents could have stated a claim by alleging retail-level predatory pricing – cannot save the complaint. Respondents, represented by sophisticated antitrust counsel, deliberately chose not to allege predatory pricing. This Court's *Brooke Group* decision clearly sets out the elements of a predatory-pricing claim: creation or maintenance of monopoly power through the setting of prices below cost, combined with a likelihood of recoupment of losses associated with below-cost pricing. *See* 509 U.S. at 223. Yet, as the dissent below recognized, the complaint does not "allege that the seller had the market power to set prices for internet connection[s] in the

retail market, that [AT&T's] retail price . . . was set below cost, [or] that losses could later be recouped." Pet. App. 23a. The dissent was discussing the allegations of the substantively identical *amended* complaint, but the same observations apply at least as strongly to the original complaint.[1] Accordingly, the Court should remand with instructions to dismiss the complaint. Whether further amendment should be permitted is a matter the district court can address in the first instance.

B. Respondents' Concession Does Not Deprive the Court of Jurisdiction or Lessen the Importance of the Question Presented

Amici, but not respondents, argue that respondents' concession that the Ninth Circuit erred somehow moots the case. *See* AAI Br. 4; Comptel Br. 6-7. The argument is incorrect: this Court's jurisdiction is intact, and there is no prudential reason to refrain from deciding the question presented. To the contrary, all the considerations that warranted review in the first place still counsel in favor of deciding the case on the merits.

---

[1] Respondents argue that they have alleged below-cost pricing because the price AT&T charged for retail Internet-access service was, for a "period," below the price AT&T charged for DSL Transport. *See* Resp. Br. 35 & n.16. But there is no allegation (and no regulatory requirement) that DSL Transport prices be set at cost, and no justification for accepting respondents' quite different allegations regarding relative wholesale and retail prices as an allegation that retail prices were below AT&T's own costs. *See also* 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 307, at 95 (3d ed. 2008) ("[I]f pricing is alleged to be predatory, then the plaintiff must plead prices below cost, because the Supreme Court has established that requirement as a matter of law.").

1. Comptel asserts in passing (at 2) that "Article III of the Constitution" requires the Court to dismiss the petition. But the fact that respondents intend to pursue their Section 2 claim is sufficient to establish that the parties are adverse for Article III purposes. For example, in *Cardinal Chemical Co. v. Morton International, Inc.*, 508 U.S. 83 (1993), both the petitioner and the respondent agreed that the only aspect of the Federal Circuit's decision under review – that is, the court's decision to vacate a finding of patent invalidity as moot – was wrongly decided. But the Court rejected the possibility that the parties "lack[ed] the adversarial posture required by Article III." *Id.* at 88 n.9. Rather, while the parties "d[id] agree on the correct answer to the question presented," they remained adverse with respect to their ongoing dispute. *Id.* The same is true here. *See also id.* at 104 (Scalia, J., concurring in relevant part) (even "the parties' total agreement as to disposition of this case poses no constitutional barrier to its resolution").[2]

This Court not infrequently decides cases where the respondent declines to defend the judgment of the court of appeals. For example, in *Forney v. Apfel*, 524 U.S. 266 (1998), the United States agreed with the petitioner that the Ninth Circuit erred in dismissing the petitioner's appeal; the Court appointed an *amicus* to defend the court of appeals' decision and reversed. *See id.* at 269. In *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825

---

[2] The parties do not in fact agree on the proper disposition of this case: petitioners seek an order directing the dismissal of respondents' Section 2 complaint, while respondents ask for a remand with leave to amend their Section 2 claim. *Compare* Pet. Br. 37 *with* Resp. Br. 33 ("whether respondents do or can state a retail predatory pricing claim . . . is best handled on remand").

(1988), the respondent "elected not to appear"; rather than dismiss the case, the Court appointed an *amicus* to defend the judgment so that it could reach the merits. *Id.* at 829 n.3. Disagreement between the parties over the legal issue presented was also lacking in *Toibb v. Radloff*, 501 U.S. 157, 160 n.4 (1991); *INS v. Chadha*, 462 U.S. 919, 931 (1983); aspects of *Bob Jones University v. United States*, 461 U.S. 574, 585 n.9 (1983); and *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 4 (1955), to name a few.[3]

Amici cite *Deakins v. Monaghan*, 484 U.S. 193 (1988), but in that case the respondents did not "confess error" on the question presented. Rather, the respondents stated that they would no longer seek the equitable relief in federal court that was the subject of the court of appeals' disputed ruling. *See id.* at 198-99. Making clear that the respondents' representation – and the Court's reliance on it – would mandate "dismissal with prejudice" of those injunctive claims, the Court concluded that the question of the federal courts' authority to render that relief was moot. *Id.* at 200; *see also Webster v. Reproductive Health Servs.*, 492 U.S. 490, 512-13 (1989) (noting that appellees' decision "to no longer seek a declaratory judgment that [a statutory provision] is unconstitutional" meant that challenge to provision was moot). Here, by contrast, respondents have made clear that they intend to continue to pursue their Section 2 claim against AT&T.

---

[3] Likewise, in the criminal context, while "[c]onfessions of error are . . . entitled to and given great weight, . . . they do not relieve this Court of the performance of the judicial function." *Sibron v. New York*, 392 U.S. 40, 58 (1968) (internal quotation marks omitted).

2. *Amici*'s suggestion that the Court should decline to reach the merits on prudential grounds, *see* Comptel Br. 2, 6-7, is likewise incorrect. AT&T's petition emphasized that the Ninth Circuit's embrace of price-squeeze doctrine would, if left unreviewed, "deter conduct that enhances efficiency." Pet. 23. The United States agreed, noting that "review is warranted because the Ninth Circuit's endorsement of [price-squeeze] theory threatens to chill retail price-cutting . . . and encourage litigation designed to protect competitors at the expense of competition, thereby undermining the procompetitive purposes of the antitrust laws and harming consumers." U.S. Cert. Br. 7. *Amici* cite as good law decisions from the Second, Third, and Seventh Circuits that endorse price squeeze as an independent basis for antitrust liability. *See* Comptel Br. 8-10. And the risk of consumer-harming consequences is accentuated by the public statement of the Federal Trade Commission supporting the Ninth Circuit's decision and endorsing the price-squeeze theory of liability. *See* Pet. Br. 21.

The Court's grant of certiorari reflects the importance of the question presented. *See* Sup. Ct. R. 10. The antitrust policy concerns that warranted review in the first place transcend the case-specific consequences of the Ninth Circuit's ruling and continue to argue compellingly in favor of a decision by this Court on the merits. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191-92 (2000) ("To abandon the case at an advanced stage may prove more wasteful than frugal."). Two *amicus* briefs defending the Ninth Circuit's decision on the

merits ensure that the Court will have the benefit of full adversarial presentation of the issues.[4]

II. THE NINTH CIRCUIT'S RULING CONFLICTS WITH THIS COURT'S ANTITRUST JURISPRUDENCE

A. *Trinko* Bars Respondents' Claim

Respondents' price-squeeze claim depends on the allegation that the combination of AT&T's wholesale and retail prices placed respondents "at a serious unfair disadvantage vis-a-vis" AT&T in the sale of DSL-based Internet-access service. Compl. ¶ 19 (JA17). But that is precisely the duty that *Trinko* rejects: "alleged insufficient assistance in the provision of service to rivals" fails to state a claim in the absence of any antitrust duty to deal at all. 540 U.S. at 410; *see* Pet. Br. 17-21; U.S. Br. 11-15; Verizon/NAM Br. 5 ("The focus on prices specifically does not take linkLine's claim outside the scope of *Trinko*'s rejection of a duty to deal.").

Amici's efforts to distinguish respondents' price-squeeze claim from the allegations at issue in *Trinko* come to nothing. Comptel asserts (at 28) that *Trinko* "did not address the viability of a price squeeze claim," but it can offer no reason that the price squeeze alleged here presents any antitrust concern that would justify treating it as distinct from the allega-

---

[4] If the Court were to decline to address the merits of the question presented, it would also invite gamesmanship by respondents that have a repeat-player interest in preserving a ruling of dubious validity. *Cf. U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). In this regard, it is worth noting that respondents nowhere even *commit* to abandon their price-squeeze claim; while they concede the error of the Ninth Circuit's holding, they do not promise that they would not take advantage of that error if given the opportunity.

tions of inadequate assistance at issue in *Trinko*.[5] In fact, there is *no* reason, because the asserted antitrust impact – restriction on the effectiveness of downstream competitors – is the same. *See* Pet. Br. 20-21.

AAI seeks to recast *Trinko* as reflecting exclusively "institutional concerns," AAI Br. 29, and it argues that such concerns are attenuated in the case of certain price squeezes, *see id.* at 30-37. The assertion that price-squeeze claims are easier for a court to evaluate and remedy than the specific allegations in *Trinko* is incorrect. *See* 3B Areeda & Hovenkamp ¶ 787d, at 376 ("As Judge Breyer explained in [*Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990)], price 'squeeze' claims are probably as difficult to administer as refusal to deal claims, thus suggesting that such claims should fare no better under *Trinko* than the essential facility claim involved in that case."); *see also* Pet. Br. 30-33; *infra* pp. 18-20. More fundamentally, the Court's rejection of a duty to deal in *Trinko* was based not merely on the concern that imposition of sharing duties imposes inappropriate regulatory responsibilities on courts; rather, it reflected first of all the recognition that forced sharing undermines incentives to invest and

---

[5] Comptel argues (at 29-30) that *Trinko* involved conduct in the upstream market but a price-squeeze claim also involves conduct in the downstream market – that is, the setting of retail prices too low relative to what rivals may find comfortable. That argument ignores the fact that in *Trinko*, too, the upstream conduct was subject to challenge only because it allegedly rendered retail rivals' services *relatively* unattractive in comparison to the defendant's. *See* Pet. Br. 20; Verizon/NAM Br. 5 ("[T]he duty to deal asserted, and rejected [in *Trinko*], was a duty to deal on terms that would enable at least some rivals to compete in the retail market.").

to innovate and threatens to restrict, not to promote, meaningful competition. *See* 540 U.S. at 407-08. All of these concerns apply equally to the particular allegations of price squeeze at issue here.

B. Recognition of Price-Squeeze Claims As an Independent Antitrust Tort Is Contrary to Precedent and Sound Antitrust Policy

Amici argue that recognition of price-squeeze claims – over and above predatory-pricing and refusal-to-deal doctrines – can forestall consumer harm with limited risk of deterring conduct that benefits consumers. That argument is wrong at the threshold in suggesting that a price squeeze even theoretically implies cognizable consumer harm. And, in any event, *amici* do not remotely justify the assertion that any benefits from establishing price-squeeze claims as available Section 2 grounds could reliably outweigh the plain, severe risks of harm from doing so. *Amici* simply ignore the competition-deadening impact of a rule that requires a wholesale monopolist to protect downstream rivals and understate the institutional objections to price-squeeze doctrine. Finally, in arguing that the regulatory context provides a reason to recognize respondents' price-squeeze claim, *amici* have matters backwards. The existence of regulation argues against recognition of a quasi-regulatory price-squeeze-avoidance duty under the antitrust laws.

In cases where it is argued that a price squeeze constitutes a constructive refusal to deal, such a claim can and should be dealt with under the law of refusal to deal. *See* U.S. Br. 14 n.8. Likewise, in cases where it is argued that a price squeeze constitutes predatory pricing, such a claim can and should be dealt with under *Brooke Group*. The

"price squeeze" rubric adds nothing but mischief and confusion to these two doctrines, which are carefully designed to protect competition and consumers, not competitors. Despite the extensive secondary literature that AAI cites, not a single commentator advocates imposition of liability for margin-based price squeeze under Section 2.

1. The existence of a price squeeze does not support any inference of consumer harm

Both AAI and Comptel argue that elimination of downstream competitors through a price squeeze may restrict consumer choice, hamper innovation, and raise barriers to entry in the upstream market. *See* AAI Br. 12-15; Comptel Br. 14-15. The invocation of such potential consequences provides no justification for condemnation of price squeezes because (1) the elimination of competitors is not *itself* sufficient basis to infer harm to competition – any form of vigorous pro-competitive conduct harms competitors but benefits consumers – and (2) in any event, *amici* identify no incremental harm from price squeeze as distinct from an outright refusal to deal.

a. *First*, the fact that unilateral conduct disadvantages or even eliminates rivals does not establish that *competition* has been harmed in the relevant sense. *See* Pet. Br. 22-26; U.S. Br. 19-21; Verizon/NAM Br. 18-20. Harm to rivals is inherent in competition: "almost all business activity, desirable and undesirable alike, seeks to advance a firm's fortunes at the expense of its competitors." *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990) (Breyer, J.). But actions that harm rivals may nevertheless benefit consumers by promoting investment and economic efficiency. This Court's anti-

trust jurisprudence is built on this basic distinction between "protection of *competition*" and protection of "*competitors*." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (internal quotation marks omitted).

AAI argues that a price squeeze should be subject to scrutiny if "the monopolist could not have made a profit by selling at its retail rates if it had purchased at its own wholesale rates," what it refers to as a "transfer price test." AAI Br. 10. But the "transfer price test" proposed by AAI is inconsistent with two important principles governing unilateral pricing decisions. As this Court held in *Trinko*, a legitimate monopolist's "opportunity to charge monopoly prices" is "an important element of the free-market system." 540 U.S. at 407. At the same time, there is no restriction on charging low downstream prices, so long as those prices are above cost. *See Brooke Group*, 509 U.S. at 223; *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990).

AAI's standard would force a monopolist either to increase retail prices, to abandon (or avoid) partial vertical integration (either by avoiding voluntary dealing or by exiting the downstream market), or to forgo the charging of monopoly prices. *See* 3B Areeda & Hovenkamp ¶ 767d2, at 145-46. To the extent a monopolist will generally avoid surrendering monopoly profits, it will follow one of the first two courses and consumers will be harmed. *See id.* at 146. Furthermore, such a rule discourages investment where it may matter most – upstream – because enforcement of a price-squeeze-avoidance duty guarantees the downstream rival a share in any improvements at the wholesale level. *See Trinko*, 540 U.S. at 407-08. "[I]t hardly seems to make antitrust sense

to say to a vertically integrated monopolist that it must not only take in non-integrated competitors but take tender care of them as well." 3B Areeda & Hovenkamp ¶ 767d2, at 146.

We explain below that a rule that subjects price squeezes to antitrust scrutiny deters pro-competitive conduct because of the risk of false condemnations and the costs associated with litigation of even unsuccessful claims. *See infra* pp. 17-18; Verizon/NAM Br. 9-17. But, even if the "transfer price test" could be perfectly and costlessly administered, there would still be no basis for concluding that it would prevent harm to competition rather than competitors. Indeed, "it is difficult to see any *competitive* significance [to a price squeeze] apart from the consequences of vertical integration itself." 3B Areeda & Hovenkamp ¶ 767c, at 137.[6] The argument that a price squeeze can eliminate competitors; that the elimination of downstream competitors may raise barriers to entry or impair non-price competition; and that therefore price squeezes should be subject to scrutiny under Section 2 simply proves too much.

---

[6] "[A]lthough it is possible to produce situations where a price squeeze leads to competitive harm, even in these cases it is possible that the results could go the other way and there would be no competitive harm." Dennis W. Carlton, *Should "Price Squeeze" Be a Recognized Form of Anticompetitive Conduct?*, 4 J. Competition L. & Econ. 271, 276 (2008). As Judge Easterbrook has explained, the point is not that challenged unilateral conduct "'never' could injure consumers"; rather, it is that there is no reason to conclude that the existence of a price squeeze causes consumer harm in circumstances that are both common enough and sufficiently easy to describe and identify to justify the costs of subjecting the conduct to scrutiny. *Schor v. Abbott Labs.*, 457 F.3d 608, 612-13 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 1257 (2007); *see infra* pp. 17-18.

Comptel argues (at 11-13) that price squeezes create the same type of harm as predatory pricing but with "far greater possibility of financial reward" and "substantially less" risk of false positives. The argument is misguided on every point. First, predatory pricing is of concern under the antitrust laws because it has the potential to eliminate *independent* competitors that would otherwise constrain the monopolist's ability to charge monopoly prices. By contrast, the antitrust laws do not prevent a monopolist from continuing to charge a monopoly price at the upstream level, and there is no reason to suppose that the presence of a downstream competitor will, as a general matter, constrain downstream pricing.

Second, the potential reward from predatory pricing is the creation of a monopoly that did not exist before (or preservation of a monopoly that is otherwise threatened), rewarding the successful predator with otherwise unavailable monopoly profits. By contrast, a wholesale monopolist already earns monopoly profits and, in general, benefits from the *presence* of efficient downstream rivals, not from their absence. *See* Pet. Br. 24.[7]

Third, the law of predatory pricing limits the risk of false positives by establishing a simple rule that above-cost pricing is lawful *per se*. By contrast, a rule that bases potential liability on the existence of

---

[7] That there may be exceptions to the rule that a monopolist cannot earn additional monopoly profits by gaining monopoly power in a vertical market, *see* AAI Br. 16, hardly alters the analysis: exceptions to the rule are themselves difficult to identify in practice and essentially impossible to embody in a workable rule of law. *See Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.). In any event, here, the downstream service and upstream input are in a one-to-one ratio. *See* Pet. Br. 24.

a price squeeze (including, in Comptel's view (at 18-19), a squeeze that results from retail pricing that equals the sum of "wholesale . . . price *and* the costs of the additional inputs included in the retail product") not only places upward pressure on retail prices, but also discourages efficient voluntary dealing and vertical integration.

b. *Second*, *amici* offer no reason to conclude that a price squeeze causes any harm to competition that is distinct from an outright refusal to deal with the downstream competitor. Yet that is the relevant harm. Indeed, a "first cut in the antitrust analysis" in *any* case should be "to query whether the defendant has any duty to deal with the plaintiff at all." 3B Areeda & Hovenkamp ¶ 767c, at 138. If there is not, "it makes no sense to prohibit a 'predatory' price squeeze." *Id.* ¶ 767c5, at 142.

This conclusion is not *merely* a case of the "greater includes the lesser," *see* AAI Br. 27-28; Comptel Br. 30, though it should be enough "[i]n general and in the present setting" to rely on that principle, *In re Catt*, 368 F.3d 789, 792 (7th Cir. 2004) (Posner, J.).[8] Rather, any incremental benefit to competition from restricting the terms of dealing that is not compelled under the antitrust laws is overwhelmed by the

---

[8] *Amici* provide no example in the Section 2 context where the principle does not hold. AAI claims that a manufacturer may "refuse to deal with a retailer that fails to adhere to the manufacturer's suggested retail prices" but may not necessarily "suspend[] the retailer for a short period," AAI Br. 27-28 (citing *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960)). But *Parke, Davis* involved the distinction between a *per se* lawful unilateral refusal to deal and *agreement* between a manufacturer and a distributor to charge a minimum resale price, which is subject to scrutiny under *Section 1*. It had nothing to do with prohibiting "less drastic" unilateral conduct. *Cf.* AAI Br. 27.

negative systemic effects of subjecting such price squeezes to scrutiny. In short, as the government explains, *amici*'s argument amounts to urging that AT&T must deal on price terms that would preserve respondents' profit margin, even though AT&T has no obligation under the antitrust laws to deal with respondents at all. *See* U.S. Br. 14. *Amici* have not remotely justified that illogical claim.

2. Recognition of price-squeeze claims would deter pro-competitive conduct

Amici do not dispute that a price squeeze may arise from conduct that benefits consumers – efficient vertical integration and retail price-cutting. And they cannot seriously question that a rule that penalizes such squeezes tends to increase prices, deter voluntary dealing, and discourage efficient downstream entry. Instead, they argue that these matters can be dealt with by "scrutiniz[ing] individual price squeeze claims, at later stages of litigation." Comptel Br. 15; *see* AAI Br. 20.

That argument should provide no reassurance, because any rule that makes the existence of a price squeeze a sufficient basis for antitrust scrutiny will pervasively discourage conduct that could give rise to a charge of price squeeze, even if justifications are permitted.[9] This is true in part because of the risk of

---

[9] Just as misguided is AAI's suggestion that liability should turn on whether "the price squeeze was specifically intended to foreclose competition from unintegrated rivals." AAI Br. 22. Aside from the emptiness of the formulation – efficient vertical integration may be specifically intended to foreclose competition from unintegrated rivals and is nonetheless beneficial for that – this Court has made clear that the claim that conduct was motivated by hostility to competitors is immaterial to antitrust analysis. *See Brooke Group*, 509 U.S. at 225. Most vigorous

false positives, which "counsels against an undue expansion of § 2 liability." *Trinko*, 540 U.S. at 414. It is also true because even a successful defense of an antitrust claim – particularly if it comes at the end of a long discovery road – imposes substantial costs on a defendant. *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1967 (2007) (noting finding that "discovery accounts for as much as 90 percent of litigation costs when discovery is actively employed"); *see also id.* at 1967 n.6. Under the approach advocated by *amici*, a competitor is forced to weigh the risks of liability and the greater risk of litigation costs when evaluating the costs and benefits of vertical integration, voluntary dealing, or retail price cuts. That risk is exacerbated in this context by the reality that downstream rivals may have every incentive to wield the threat of litigation in order to induce a vertically integrated rival to "pull[] its competitive punches." *Olympia*, 797 F.2d at 375; *see* Pet. Br. 26 n.15; *id.* at 27 n.16 (noting risk of collusion). When such anticompetitive consequences are weighed against the questionable risk of incremental consumer harm from a price squeeze, it is particularly clear that subjecting such conduct to scrutiny is "not worth the candle." *Schor*, 457 F.3d at 613.

3. Price-squeeze doctrine forces courts to act as regulators

In part because they neither clearly articulate nor agree on a price-squeeze standard, *amici* offer no answer to the concern that enforcement and remedy of such a duty would impose inappropriate administrative burdens on courts. *See* Pet. Br. 30-33. Rather,

---

competition shares that motivation. *See Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 379-80 (7th Cir. 1986) (Posner, J.).

they argue that administrative concerns may be attenuated when the defendant's wholesale prices exceed its own retail prices. *See* AAI Br. 30; Comptel Br. 17-18.

As an initial matter, there is no more reason to believe that a wholesale-exceeds-retail price squeeze will harm competition than that any other price squeeze will do so – such a pricing pattern may simply reflect market conditions, and, in any event, consumers benefit from the reduction in retail prices, even if competitors suffer losses. The objection that there can generally be no antitrust harm from such a squeeze distinct from the harm associated with an outright refusal to deal (presumptively lawful here) holds good.

More to the point, the wholesale-exceeds-retail benchmark does little to alleviate institutional concerns. As previously noted, the retail price need not reflect the full *revenue* benefits of retail sales. *See* Pet. Br. 32-33 & n.21. That is particularly true where a narrow focus on an individual retail service – here, DSL-based Internet-access service – fails to take account of the business importance of sales of packages of services to consumers. For example, a customer who purchases voice service and DSL-based broadband service from a single provider may be less likely to switch *both* voice and broadband service to a competing provider; as a result, the expected revenue benefit from retail broadband sales must take account of voice revenues as well. And all of this ignores the fact that the relationship between wholesale and retail prices is not static.[10] In sum, sorting out these

---

[10] The original complaint here made no reference to wholesale prices exceeding retail prices at any point. And the amended complaint simply states that they did so for a "period

facts and evaluating their competitive significance would impose unmanageable tasks on the court and would invite costly errors.

4. Consideration of the regulatory context supports dismissal

Amici argue that recognition of a price-squeeze claim is appropriate here because (1) AT&T is subject to price regulation at the wholesale but not at the retail level, and (2) wholesale-price regulation may be ineffective. *See* AAI Br. 17-19, 31-34; Comptel Br. 19-26. But, far from providing a justification for recognizing an unprecedented price-squeeze-avoidance duty under the antitrust laws, the presence of regulation provides a further reason to reject respondents' claim. *See* Pet. Br. 35-37.

First, *amici* offer no coherent basis for believing that the regulatory context provides either means or motive for conduct that would raise any antitrust concern. Comptel argues simultaneously that AT&T is motivated to squeeze downstream competitors – so as to earn monopoly profits denied at the wholesale level, *see* Comptel Br. 19-21 – and that AT&T is not effectively regulated at the wholesale level at all, *see id.* at 24-26; *see also* AAI Br. 31-34. The assertions are mutually contradictory; more important, neither provides any basis for recognition of price-squeeze liability in general or in this case. To the extent AT&T is subject to strict pricing regulation at the wholesale level, the regulator has authority to take retail rates – and downstream rivals' complaints about price squeeze – into account in setting those

---

of substantial time," Am. Compl. ¶ 20 (JA33) – which is entirely consistent with the fact that wholesale prices were *generally* below retail prices.

rates. And, to the extent AT&T is *not* subject to effective price regulation at the wholesale level, avoidance of price regulation at the wholesale level would provide no incentive to engage in a price squeeze.

Amici ultimately argue that, in the absence of effective regulatory enforcement, a monopolist can use a price squeeze to "forc[e] out competition." Comptel Br. 26. But that argument does not distinguish the situation in which there is regulation from a price squeeze in an unregulated market, and the existence of regulation is therefore essentially irrelevant to the antitrust analysis. Indeed, *amici* may not rely on the existence of a *regulatory* duty to deal to justify enforcement, under the antitrust laws, of an obligation to avoid a price squeeze: *Trinko* demonstrates that "the antitrust laws should not be used to enforce what boils down to a regulatory obligation to deal." U.S. Br. 14, 28.

Second, *amici*'s argument that regulation is ineffective in this context rings hollow in light of respondents' failure ever to pursue a challenge to AT&T's rates before the responsible agency. There is no dispute that the Federal Communications Commission ("FCC") has the *authority* to address price-squeeze concerns under the just-and-reasonable standard, and it can do so based on expertise and with the flexibility to adapt to changing conditions. *See* Pet. Br. 35-36.[11] Given the existence of this regulatory structure, it would be particularly in-

---

[11] For whatever it is worth, after the period covered by the complaint, the FCC imposed – as a condition of approval of AT&T's merger with BellSouth – a requirement that AT&T set the wholesale price for DSL Transport no higher than the retail price of AT&T's own DSL-based Internet-access service. *See* Pet. Br. 5 n.4.

appropriate to impose a price-squeeze-avoidance duty under the antitrust laws.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with instructions to dismiss the complaint.

Respectfully submitted,

ED KOLTO
GLEAM O. DAVIS
AT&T SERVICES, INC.
1150 South Olive Street
Los Angeles, CA 90015
(213) 743-6700

PATRICK J. PASCARELLA
AT&T SERVICES, INC.
175 E. Houston Street
San Antonio, Texas 78205
(210) 351-3409

MICHAEL K. KELLOGG
Counsel of Record
AARON M. PANNER
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Petitioners

November 13, 2008